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Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Dear Members of the Committee:

We hereby submit comments strongly opposing the proposed discovery changes to the Federal Rules of Civil Procedure.

Contrary to Federal Rules that have been in place for 75 years, these proposed rule changes would give wrongdoers the ability to argue that information, which is solely in their control, is too expensive or burdensome to produce even though this information may be critical to the victim's case. The new rules significantly limit the number of depositions and the number of hours for oral depositions and the number of interrogatories. Further, Rule 36 would create a limit of 25 Requests for Admissions. This is a major change since it adds a limit where one currently does not exist. The changes are presumptive, meaning that courts will presume they should apply unless an appeal is made otherwise. So while it may be technically possible to overcome these limits, this will be difficult and therefore they will apply in many important cases. Especially hurt will be victims in fact-intensive cases like civil rights and employment discrimination, as well as cases involving product liability, bank fraud, environmental violations, and other complex cases like anti-trust, where evidence vital to proving the case is often in the sole possession of the wrongdoer(s).

Another provision would weaken rules meant to ensure that wrongdoers do not destroy documents, and would invite corporate wrongdoers to "ignore their affirmative duties to preserve evidence." *See., e.g.,* Nineteenth Century Rules For Twenty-First Century Courts? An Analysis and Critique of 21st Century Civil Justice System: A Roadmap For Reform Pilot Project Rules (Implementing The Final Report On The Joint Project Of The American College Of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System) Analysis and Critique Prepared by Center for Constitutional Litigation, PC, Washington, DC March, 2010. (This proposal "radically alters the standard by which spoliation of evidence is judged. Currently, a duty to preserve arises when litigation is reasonably anticipated, and even negligent breach of the duty can be sanctioned. *Pension Plan v. Banc of Am. Sec., LLC*, No. 05-civ-9016, 2010 WL 184312, *12 (S.D.N.Y. Jan. 15, 2010) (Shira A. Scheindlin, D.J.) (emphasis added). Under the existing regime, the level of culpability (negligence, recklessness, intentional conduct) affects the degree of sanction, not the possibility

of it. *Id*. The existing regime is deeply grounded in the protection of the integrity of judicial processes. Id. at *12 & n.24.")

The proposals, ostensibly meant to cut costs in civil cases, will have the opposite effect by increasing the time spent sorting out disputes that are resolved with the current rules. Moreover, much of the discovery "costs" of which corporate wrongdoers complain are due to their applying resources to hide information or prevent the disclosure of documents. This should not be a basis to make it even harder to get information out. See, e.g., David Halpern, Discovery Abuse: How Defendants in Products Liability Lawsuits Hide and Destroy Evidence, Public Citizen (July 1997), http://www.citizen.org/congress/article_redirect.cfm?ID=918. Examples of typical discovery abuses include providing misleading responses to discovery requests – responses that obscure the fact that the defendant is deliberately withholding documents sought by the plaintiff; shielding mountains of documents behind the attorney-client privilege without demonstrating or even confirming that all such documents are subject to the privilege; seeking elaborate protective orders aimed at hiding damaging product information from the public, the media and government agencies – as well as from others who claim injury from the same product; and finally, forcing plaintiffs to agree to forever seal the records of a case – including, sometimes, the transcripts of a public trial. Some cases involved defendants refusing to comply even after judicial orders were issued. In other cases, defendants blatantly concealed and destroyed documents relevant to their defective products – often while denying that such records ever existed. These problems are certainly continuing and could become worse under new e-discovery rules. See also, for example, "Court Awards $750,000 as Civil Contempt Sanction For Discovery Abuse," E-discovery Case Law Update, April 15, 2011.

When the rights of the injured or violated are vindicated in court, we all benefit. Not only do individuals get justice, but also future violations are prevented, and internal information about corporate wrongdoing is disclosed. This disclosure comes not only from public trials, but also from evidence that is collected during pre-trial discovery and made public. These proposed changes would benefit corporate wrongdoers trying to hide information in a case. The result would be not only that victims might be unable to build needed evidence to prove their case, but also that the wider public, including policy and advocacy groups, might never learn core facts about corporate wrongdoing.

We urge you to reject these proposed rule changes. Please do not hesitate to contact us with any questions.

Very sincerely,

Joanne Doroshow
Executive Director